The NFLPA's Arbitration Procedure: A Forum for Professional Football Players and their Agents to Resolve Disputes

I. INTRODUCTION

For years arbitration has existed as an alternate forum for solving labor disputes and more recently has become a popular instrument in collective bargaining agreements. In fact, arbitration is the most widely used dispute resolution mechanism in unionized industries.[1] The professional sports industry is no exception, as player unions have evolved in the past few decades and achieved various important concessions for players. Historically, collective bargaining agreements contained arbitration provisions to solve labor disputes between employees and management, but a recent practice is the application of arbitration provisions to cover differences between players, agents, and team management.[2]

One particular union for professional athletes, the National Football League Players Association (NFLPA), became the exclusive bargaining representative of professional football players in the National Football League (NFL) and instituted an arbitration procedure to specifically cover conflicts between NFL players and their contract advisors (agents) in the *NFLPA Regulations Governing Contract Advisors* ("*NFLPA Regulations*").[3] As a result of these regulations, arbitration has played an integral role in shaping the behavior of both parties in the player-agent relationship in professional football.

The National Labor Relations Act permits a union to become the exclusive bargaining representative for all the employees of an employer if a majority of employees support the union and the proper procedure for certification is followed.[4] The NFLPA obtained the support of a majority of players in the NFL and was recognized as the first union of professional athletes certified

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1. Abrams, *Sports Labor Relations: The Arbitrator's Turn At Bat*, 5 ENT. & SPORTS. L.J. 1, 3 n.11 (1988) (citing the Bureau of National Affairs' survey of collective bargaining agreements which found that 99% of its sample of contracts contained an arbitration provision). *See also* L. MERRIFIELD, T. ST. ANTOINE, & C. CRAVER, LABOR RELATIONS LAW 647 (1989) (citing 1981 study by U.S. Department of Labor).

2. Ensor, *Comparison of Arbitration Decisions Involving Termination In Major League Baseball, The National Basketball Association, and The National Football League*, 32 ST. LOUIS U.L.J. 135 (1987).

3. NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION'S REGULATIONS GOVERNING CONTRACT ADVISORS § 7 (Nat'l Football League Players Ass'n 1983 and as amended October 1, 1988) [hereinafter NFLPA REGULATIONS].

4. National Labor Relations Act § 9(a), 29 U.S.C. § 151 (1990).

by the National Labor Relations Board.[5] The NFLPA entered into a collective bargaining agreement with the NFL Management Council, representing owners of NFL teams, on September 4, 1983.[6] This collective bargaining agreement provided only a minimum salary standard and other basic amenities for NFL players.[7]

The NFLPA was given the right to enact the *NFLPA Regulations* in the original collective bargaining agreement between the NFLPA and the NFL owners. Under this plan, the NFLPA reserved the exclusive right for "the NFLPA or *its agent*" to negotiate individual NFL players' contracts.[8] Sports agents could become "agents" of the NFLPA by becoming certified as NFLPA "contract advisors."[9] With this wording, the NFLPA was able to subject all agents involved in negotiations and financial affairs for players in connection with NFL team contracts to an arbitration procedure to solve disputes between the parties.[10]

The *NFLPA Regulations* were promulgated as an outgrowth from the collective bargaining agreement to cure the evils present in the sports agent profession and offers arbitration as a quick, efficient solution to these problems. The NFLPA enacted the *NFLPA Regulations* because many agents were taking a substantial portion of the player's salary as a charge for the

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5. Telephone interview with Mark Levin, NFLPA Agent System Coordinator (Jan. 11, 1990).

6. Ensor, *supra* note 2, at 138.

7. Note, *Regulation of Sports Agents: Since at First It Hasn't Succeeded, Try Federal Legislation*, 39 HASTINGS L.J. 1031, 1043 (1988) (authored by David Lawrence Dunn).

8. NFLPA REGULATIONS, *supra* note 3, at 1 (emphasis in original). This language is based upon Article XXII, § 2 of the 1982 Collective Bargaining Agreement between the NFLPA and the NFL Management Council, which gave the NFLPA the authority and duty to promulgate the *NFLPA Regulations*. Under federal labor law, the NFLPA, as the exclusive bargaining representative of NFL players, was permitted to promulgate regulations to govern the representation of NFL players in individual contract negotiations. The National Labor Relations Act states:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

National Labor Relations Act § 9(a), 29 U.S.C. § 151 (1990).

9. NFLPA REGULATIONS, *supra* note 3, § 1.

10. *Id.* § 7(A).

negotiations and engaging in suspect conduct as financial advisors.[11] The *NFLPA Regulations* states this reason in the introduction by providing: "This system was developed because of the growing concern among NFL players about the quality of representation offered in the past by lawyers, agents, and others in individual contract negotiations with NFL clubs."[12] Many sports experts have expressed attitudes favoring this type of regulation to protect players from agent exploitation. In an effort to promote methods of regulation to protect athletes from the unscrupulous conduct of some agents, one author noted:

> A dramatic increase in the amounts of money paid for the services of professional athletes has caused an increase in unethical conduct by athlete agents. This increase also has prompted frequent legal disputes. Many professional athletes find their on-the-field accomplishments being overshadowed by their off-the-field legal difficulties. At no time has the need to regulate athlete agents been greater than at the present. Any form of regulation must control and deter unethical conduct by agents. In addition, the regulations must allow the athlete to make the best business decision available when entering into a contract with a professional team.[13]

Many states have also enacted legislation regulating the actions of agents in their dealings with professional athletes or prospective professional athletes.[14] These statutes impose criminal sanctions on agents violating these rules, but do not set forth a method of dispute resolution. These statutes have an advantage over nonlegislative regulations because statutory criminal sanctions act as a more effective deterrent to agent abuse than the sanctions imposed by other regulations. Also, a state's proven enforcement power poses a far more tangible threat than do the untested enforcement mechanisms of nonlegislative regulations.[15] Though state legislation has many theoretical advantages, it has been ineffective due to variance of laws and jurisdictional problems between the states.

The *NFLPA Regulations* avoids the jurisdictional problem inherent in state legislation by creating a system where both parties agree to arbitration as a forum for dispute resolution before entering into a legal relationship. This

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11. Note, *supra* note 7, at 1031-33, 1035-37.

12. NFLPA REGULATIONS, *supra* note 3, Introduction at i.

13. Note, *Regulating the Professional Sports Agent: Is California in the Right Ballpark?*, 15 PAC. L.J. 1231, 1258 (1984) (authored by Dana Alden Fox).

14. Note, *supra* note 7, at 1049-64.

15. *Id.* at 1049.

remedy avoids the following possible scenario of conflicting state legislation postulated by a prominent sports attorney: If an agent lives in Connecticut, has an office in New York, and is seeking to represent an athlete who just finished college in Oklahoma, was chosen by the Dallas Cowboys in the NFL draft, and whose mother lives in Los Angeles; and the mother, son, and prospective agent meet in California to discuss representation; which state can properly assert jurisdiction?[16] The *NFLPA Regulations* solve this problem for all NFL players and registered agents, regardless of their state of residence. Both the player, as a member of the NFLPA, and the agent, as a certified contract advisor of the NFLPA, consent to arbitration by their membership in the organization.[17] The United States Supreme Court ruled that a union may force agents to become licensed by a union in order to represent union members and thereby regulate the agents.[18] The Court stated that federal labor law defines this activity as a statutory exemption to antitrust law because the actors' union regulations at issue in the above case were enacted for the self-interest of the union members and the agents were a labor group in this type of relationship.[19] It has been debated whether the *NFLPA Regulations* would similarly be exempt from antitrust review,[20] but to date no party has challenged this arrangement.[21]

This Note will provide a historical view of the *NFLPA Regulations* and the arbitration decisions rendered under its provisions to demonstrate what future arbitrators might view as precedent in this unique area of law. An intricate analysis of the details of the *NFLPA Regulations* allows a better understanding of the arbitration decisions based on these regulations.

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16. *Id.* at 1065 (citing telephone interview with Lloyd Shefsky, former President of the National Sports Lawyers Association, Oct. 2, 1986).

17. NFLPA REGULATIONS, *supra* note 3, § 7.

18. H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704 (1981).

19. *Id.* at 717.

20. Note, *The NFL Players Association's Agent Certification Plan: Is it Exempt from Antitrust Review?*, 26 ARIZ. L. REV. 699 (1984) (authored by Lori J. Lefferts).

21. Telephone interview with Mark Levin, NFLPA Agent System Coordinator (Jan. 11, 1990).

II. SCOPE OF *NFLPA REGULATIONS*

An agent must be certified by the NFLPA before undertaking the job of negotiating a contract with an NFL team under the *NFLPA Regulations*.[22] These regulations specify types of illegal conduct as well as providing rules regarding the maximum amount of fees an agent may collect from a player. The regulations govern any agent involved in negotiating contracts with NFL teams or advising individual players in this context.[23] An agent is investigated and a license denied if the agent has been involved in prior conduct constituting fraud, misrepresentation, embezzlement, misappropriation of funds, or theft.[24] Before an agent can represent a player, the parties are obligated to sign a Standard Representation Agreement, which is a supplement to the *NFLPA Regulations*, along with an Application for Certification.[25]

The regulations outline activities or conduct of contract advisors, or agents, which are to be governed by the rules. Once certified as an NFLPA contract advisor, an agent is governed by all guidelines set forth in the *NFLPA Regulations*. The relevant rules include the following: (1) the agent and player are obligated to sign a "standard representation agreement" or similar form approved by the NFLPA;[26] (2) a set maximum percentage of the player's compensation that an agent may collect as a fee;[27] (3) an agent cannot collect a fee until the player actually receives the compensation upon which it was based;[28] (4) an agent cannot induce a player to sign a represen-

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22. NFLPA REGULATIONS, *supra* note 3, § 1.

23. *Id. See also* Exhibit C, Standard Representation Agreement Between NFLPA Contract Advisor and Player. *Id.*

24. *Id.* § 2(C).

25. *Id.* § 4. It is noteworthy that § 3 provides: "The Contract Advisor shall be solely responsible and liable for, and shall hold the NFLPA harmless from, any damages or claims arising from his or her activities as contract advisors." *Id.* § 3.

26. *Id.* § 4(A), Exhibit C at C-1. Using the standardized form also provides the agent with the benefit of being recognized as the exclusive contract advisor of the athlete. The *NFLPA Regulations* prohibit an agent from drafting an advantageous representation contract by providing, "A player may make an agreement with a Contract Advisor which is more, but not less, favorable than the form contract contained in Exhibit C. No deviation, addition, or deletion shall be made in the form contract without approval of the NFLPA." *Id.* § 4(A).

27. *Id.* § 4(D). "The maximum fee which may be charged or collected by a Contract Advisor shall be no more than five percent (5%) of the compensation received by the player in excess of the minimum salary applicable to the player's years of service for that year."

28. *Id.*

tation agreement with valuable consideration or misleading statements;[29] (5) agents must disclose present and prior representation of NFL team management personnel to their clients;[30] and (6) an agent is compelled to resolve all disputes with a player/client arising under the regulations in accordance with the arbitration procedure outlined in the regulations.[31] These rules basically cover all types of agent conduct involved in assisting a professional football player to sign a contract with an NFL team, as well as the financial services performed on behalf of a player/client.[32]

III. The Arbitration Procedure

The *NFLPA Regulations* require one party, either the player or agent, to initiate arbitration proceedings by filing a written grievance within six months from the date of the occurrence upon which the grievance is based or within six months from the date on which the facts of the matter became known or reasonably should have become known to the grievant, whichever is later.[33] The other party must answer within only ten days of receipt of the grievance.[34] Once the answer is filed, the NFLPA undertakes an investigation of the grievance and attempts to mediate the dispute.[35] If mediation is unsuccessful, the petitioner has thirty days from receipt of the respondent's answer to appeal to arbitration.[36] The arbitrator is then selected by the Executive Committee of the NFLPA, which is required to select "a person with sufficient experience in arbitration of issues in either the sports or entertainment business" to serve as the arbitrator.[37] This speedy process allows the parties to resolve their dispute in a fast, efficient manner.

Many of the arbitration cases have involved the standard representation agreement, which the agents and players are required to sign before an agent

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29. *Id.* § 5(C).

30. *Id.* § 4(B). Contract advisors must attach a list of all their NFL management clients, past and present, to the representation agreement. Each contract advisor must also forward a copy of the list to the NFLPA. *See also id.* § 5(B)(2).

31. *Id.* § 7(A).

32. *Id.* § 1(A)-(E).

33. *Id.* § 7(B).

34. *Id.* § 7(C).

35. *Id.* § 7(D).

36. *Id.* § 7(E).

37. *Id.* § 7(F).

can perform any negotiation services for a player.[38] An agent does not have much leeway, because an agent cannot make a player sign an agreement that is less favorable to the player than the form contract attached as an exhibit to the *NFLPA Regulations*.[39] The standard representation contract provides a maximum fee that agents can charge players, a mandatory arbitration clause, and a disclaimer of liability, which exculpates the NFLPA from any liability caused by the agent's actions.[40]

The arbitration procedure outlined in the *NFLPA Regulations* have efficiently handled more than sixty cases to date. The majority of these cases have been resolved before a decision could be rendered. Mediation has successfully resolved some of these cases, while others have been settled before or after the initial hearing in front of the arbitrator. A few complaints were withdrawn before the grievance could be heard on its merits. Arbitrators have had the opportunity to render decisions in excess of twenty cases and have established a proper standard of conduct in their opinions.[41] Only three arbitrators have had the opportunity to hear these cases: Kenneth E. Moffett, John C. Culver, and Ronald P. Kaplan. Culver, a former United States Senator from Iowa and collegiate football player at Harvard University, has ruled on over fifteen of the most recent cases and continues to act as the designated arbitrator for this procedure due to his expertise in the area.[42]

The arbitrators have found a harmonious balance between a literal interpretation of the regulations and equitable concerns. An arbitrator has wide decision-making powers, but these arbitrators have never seriously challenged modern legal constraints. The *NFLPA Regulations* grant an arbitrator the ability to assess some or all of a party's costs to the opposing party if the grievance is deemed frivolous in nature, but arbitrators have never used this provision.[43] The decisions have covered small technical

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38. *See* International Merchandising Corp. v. Smerlas (June 29, 1989) (Culver, Arb.); Landrum v. Gross (Sept. 10, 1987) (Culver, Arb.); Cole v. Lustig (July 16, 1987) (Culver, Arb.). All arbitration cases mentioned herein and hereafter were obtained from the NFLPA. Inquiries can be directed to: NFLPA, 2021 L Street, N.W., Washington, D.C. 20036. Telephone number: (202) 463-2200.

39. *See* note 26, *supra*.

40. *Id.* Exhibit C.

41. Telephone interview with Tom DePaso, Esq., NFLPA Staff Counsel (Jan. 18, 1990).

42. *Id.*

43. NFLPA REGULATIONS, *supra* note 3, § 7(H). Parties have asked the arbitrator to award attorney fees, but have been denied. *See* Fraley v. Roberts (Mar. 12, 1987) (Culver, Arb.); Hafner v. Grant (Feb. 5, 1987) (Culver, Arb.).

violations of the rules as well as clear cases of fraud.[44] Although most cases to date have been brought on behalf of an agent seeking compensation,[45] players have also initiated grievances against agents for a refund of monies paid or a rescission of their agreement.[46]

The arbitration cases to date have covered many of the important rules designated in the *NFLPA Regulations*. Players and agents have both initiated this formality as a means for settling their disputes, and have complied with the terms and remedies set forth in the decisions.[47] The *NFLPA Regulations* state that each arbitration decision "will constitute full, final and complete disposition of the dispute, and will be binding upon [the player and] the Contract Advisor involved. . . ."[48]

Although arbitrators are in no way bound by prior decisions, they have adopted the same patterns of reasoning as earlier arbitrators.[49] Consequently, these cases must be analyzed to determine the likely outcome of future grievances covering the same issues.

IV. Arbitration Cases

The cases to date have considered a number of important issues. The arbitrators have strongly influenced the conduct of both players and agents through their resolution of these disputes. Players and agents must now abide by the standards of conduct enunciated in prior arbitration cases in order to avoid this adversarial procedure being used against them. Compliance with the required procedures has been excellent; only one default award has been granted for an opponent's failure to attend a scheduled hearing.[50]

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44. *See* Dickerson v. Rodri, at 15 (Aug. 3, 1989) (Kaplan, Arb.) (technical violation); Bloom v. Harmon, at 17-20 (Oct. 28, 1987) (Culver, Arb.) (illegal inducements).

45. *See* Singman v. Young (June 23, 1989) (Culver, Arb.); Browner v. Browner (Apr. 14, 1987) (Culver, Arb.); Kiles v. Manley (Aug. 28, 1986) (Culver, Arb.).

46. *See* Cole v. Lustig (July 16, 1987) (Culver, Arb.); Robbins v. Courrege (Nov. 18, 1985) (Moffett, Arb.).

47. Telephone interview with Mark Levin, NFLPA Agent System Coordinator (Jan. 11, 1990).

48. NFLPA Regulations, *supra* note 3, § 7(G). This section further states, "[T]he Arbitrator will not have the jurisdiction or authority to add to, subtract from, or alter in any way the provisions of these Regulations or any other applicable document."

49. Wilson v. Courrege (Nov. 12, 1986) (Culver, Arb.).

50. Letter from Arbitrator Kenneth E. Moffett to Joe McCall, an NFL player (Dec. 12, 1985) (notifying McCall of the default award entered in McCall's favor against his former agent, Jeff Allen; copies were sent to Jeff Allen and the NFLPA office).

The most common subjects addressed in the cases are the timeliness of the grievance, quantum meruit awards, and the fiduciary duty of the agent.

A. *Timeliness of the Grievance*

The *NFLPA Regulations* specify that a written grievance must be filed within six months of the occurrence upon which the grievance was based or within six months from the date on which the facts of the matter became known or reasonably should have become known to the grievant, whichever was later.[51] The arbitrators have liberally construed this statute of limitations by allowing many complaints to proceed through the system regardless of the time of occurrence and filing. Arbitrators have manipulated the filing requirement for the benefit of both players and agents who have initiated grievances. The justification for this leniency is that it allows the cases to be heard instead of dismissed due to the statute of limitations.[52]

In one case, a player demanded a refund from his agent, and the arbitrator was able to avoid confrontation with the statute of limitations by viewing the violations of the agent as continuous, rather than a single occurrence.[53] This tactic enabled the complaint to relate to the date of the last interaction between the parties, as opposed to the date when the player forwarded payment to his agent. The statute of limitations was therefore tolled until the representation agreement was terminated. Arbitrator Culver ruled on the merits of the case by stating:

> [T]he grievance is not based upon a single event or occurrence but rather on a series of transactions or non-transactions spanning a period of several months. In this sense, the grievance alleges a continuing violation that does not render it untimely. Indeed, an appropriate date by which to measure timeliness would be the date when the relationship between the parties formally ended . . . .[54]

In a few cases brought by agents seeking compensation from players, the arbitrator successfully construed the time period in favor of the agent to

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51. NFLPA REGULATIONS, *supra* note 3, § 7(B). All time limitations in the arbitration procedure may be extended by mutual agreement of the parties involved. *Id.* § 7(A).

52. *See* Hafner v. Grant (Feb. 5, 1987) (Culver, Arb.) (agent seeking compensation for services performed); Wilson v. Courrege (Nov. 12, 1986) (Culver, Arb.) (player seeking a refund from agent).

53. Wilson v. Courrege (Nov. 12, 1986) (Culver, Arb.).

54. *Id.* at 15.

allow the cases to proceed to arbitration. In *Hafner v. Bellinger*,[55] the agent, Hafner, was permitted to bring the complaint based on his good faith effort to institute a grievance within the required time. Although Bellinger never received a copy of the grievance, Arbitrator Culver explained that "Mr. Hafner made a diligent effort in good faith to serve Mr. Bellinger with a copy of the grievance" by sending a copy of the grievance to the front office of Bellinger's team, the Buffalo Bills.[56] The arbitrator further ruled that Bellinger and his counsel were made aware of the grievance upon receiving notice from the arbitrator that a hearing had been scheduled. The arbitrator condemned the player's complacency by adding that the player and his counsel "had sufficient time between the notice of the hearing and the hearing itself to obtain a copy of the grievance and familiarize themselves with its allegations."[57] The player could have obtained a copy from the NFLPA because the regulations require an agent to provide the NFLPA with a copy of the grievance served on a player.[58] In another case involving an agent seeking compensation from a player, the arbitrator ruled that the six month period did not begin to run until the agent was aware of the player's refusal to pay for negotiation services performed.[59] The grievance was timely because the agent initiated the grievance procedure after receiving no response from two billing letters sent to the player.[60]

Arbitrators have liberally interpreted the statute of limitations contained in the *NFLPA Regulations* in order to allow the maximum number of cases to proceed to arbitration. Overall, arbitrators have acted fairly in cases involving the timeliness of a grievance. Both players and agents have benefited from this liberal interpretation of the regulations.

Arbitrators have been more strict in cases involving a late appeal to arbitration after mediation. The *NFLPA Regulations* provide that once an answer is filed, the NFLPA will attempt to mediate the dispute on an informal basis.[61] Then, if the grievance is not resolved through mediation within thirty days, either party may appeal to arbitration, but in any event the grievance must be appealed within ninety days, or it shall be considered

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55. Hafner v. Bellinger (Jan. 13, 1987) (Culver, Arb.).

56. *Id.* at 11.

57. *Id.*

58. NFLPA REGULATIONS, *supra* note 3, § 7(B).

59. Blatt v. Gross (Apr. 5, 1988) (Culver, Arb.).

60. *Id.* at 11-12.

61. NFLPA REGULATIONS, *supra* note 3, § 7(D).

withdrawn and dismissed.[62] Arbitrators have taken a literal interpretation of this language by dismissing grievances in which appeals to arbitration were not filed in a timely manner. The two cases involving appeals to arbitration that were not filed within ninety days of receipt of the answer were dismissed.[63]

B. *Quantum Meruit Awards*

Quantum meruit awards exemplify the equitable powers of the arbitrator. Quantum meruit awards give one party to a contract the reasonable value of services rendered, regardless of the specific terms of the contract. Quantum meruit awards have been granted in situations in which agents have violated parts of the *NFLPA Regulations*, but still deserve some compensation for their efforts. This type of award is very controversial because it allows the agent to collect fees after engaging in conduct contrary to the spirit of the regulations. Nevertheless, agents have been awarded payments from players under this theory, regardless of their conduct.

The requirement of a written contract has been the subject of a few cases involving agents seeking compensation for services performed. The arbitrator has repeatedly stressed the importance of a written contract. In the absence of a written contract, the arbitrator must decide whether the agent is entitled to any compensation for services performed on behalf of the player. The *NFLPA Regulations* provide that before an agent can negotiate for a player with an NFL team, the player and agent must execute a signed written agreement in the form prescribed by the regulations.[64] In addition to this provision, the *NFLPA Regulations* state that "[a]ll agreements between a Contract Advisor and a player which are not in writing or which are not in compliance with these Regulations shall be of no force and effect."[65] For this reason, arbitrators have struggled with grievances involving agents seeking compensation without valid representation agreements. Quantum meruit awards, which would not be permitted under a literal interpretation of the regulations, prevent a player from being unjustly enriched from services provided by the agent.[66]

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62. *Id.* § 7(E).

63. *See* Western Pro Sports v. Starring (May 18, 1988) (Culver, Arb.); Browner v. Browner (Apr. 14, 1987) (Culver, Arb.).

64. NFLPA REGULATIONS, *supra* note 3, § 4(A).

65. *Id.*

66. *See* Blatt v. Gross, at 15 (Apr. 5, 1988) (Culver, Arb.).

In *Hafner v. Grant*,[67] the representation agreement specified that the agent had to conduct "all" negotiations in order to receive a fee. But through no fault of his own, the agent, Hafner, was unable to deal directly with the player's team. The team disregarded Hafner in much of the contract negotiations due to his negotiating strategy and his access to otherwise undisclosed salary information. As a result of Hafner's inability to negotiate with the team, the player, Grant, personally negotiated the terms of his contract. The arbitrator used the equitable theory of quantum meruit to award Hafner fees for his services. The arbitrator based this decision on an overall reading of the agreement and concluded that the agreement was not intended to deny the agent compensation if he was not involved in every aspect of the negotiation process.[68] Although the agent played a significant role behind the scenes in the negotiations, the arbitrator only awarded him the reasonable value of the services he performed, not the fee percentage contained in the contract. This ruling illustrates the equitable nature of the arbitrator's decision making process and the manner in which an arbitrator typically attempts to balance the interests instead of ruling completely in favor of either party.

In another case involving an agent seeking compensation in the absence of a written agreement, the arbitrator again issued an award based on quantum meruit. In *Blatt v. Gross*,[69] a representation agreement naming Michael Blatt as contract advisor for Al Gross expired before Blatt was able to successfully negotiate a contract for Gross with the Cleveland Browns. Blatt and a colleague, as operators of Sun West Sports, initiated a grievance against Gross to collect money for the last offer conveyed to Gross under their representation. Blatt had successfully negotiated a two-year contract with the Browns that had expired along with the representation agreement. During negotiations with the Browns for a new contract, Blatt submitted various offers to Gross, who rejected them based on salary considerations. Later, Gross sent a letter to Blatt terminating representation and was able to sign a new contract under the guidance of another agent. The problem that confronted the arbitrator was that the original representation agreement had expired before the negotiations with the Browns. The arbitrator pointed out the necessity of a written contract, but refused to deny the agents compensation. Although the agents did not succeed in negotiating an NFL player contract acceptable to the player, the arbitrator focused on the unjust enrichment to the player and awarded the agents an amount based on a reasonable

67. Hafner v. Grant (Feb. 5, 1987) (Culver, Arb.).

68. *Id.* at 19-20.

69. Blatt v. Gross (Apr. 5, 1988) (Culver, Arb.).

hourly rate under the theory of quantum meruit.[70] Even in the absence of a representation agreement, agents were able to receive compensation for services provided to a player, further demonstrating the arbitrator's desire to appease both parties. The arbitrator satisfied both parties by allowing the player to avoid the possibility of having to pay an excessive amount of money based on a percentage of his contract, and by enabling the agents to receive a fair amount of compensation.

The quantum meruit theory was extended to include a situation in which agents represented a player with the use of a deviant representation agreement under NFLPA standards.[71] The *NFLPA Regulations* require a player and agent to sign a standard representation agreement before an agent engages in contract negotiations with an NFL team on behalf of an NFL player. Any deviations, additions, or deletions from the standard agreement must be approved by the NFLPA.[72] In this case, the NFLPA never approved the deviations from the standard agreement, thereby negating the existence of the agreement. The arbitrator displayed his compromising attitude once again by awarding the agents a reasonable value for the services they provided to their client, instead of declaring the agreement null and void.[73]

C. *Breach of Fiduciary Duty*

Arbitrators have not been as accommodating in cases dealing with an agent breaching the fiduciary duty owed to a player. Many representation agreements provide for the agent to act as a financial advisor for the player in addition to engaging in negotiations on the player's behalf. The arbitrators have made it clear that agents breaching the fiduciary duty owed to a player in their representation relationship will be denied any compensation, regardless of the beneficial services performed. One example is a grievance filed by an agent who worked hard, but was unable to negotiate a contract with an NFL team on his client's behalf before the representation agreement expired.[74] The arbitrator denied the agent's grievance due to the agent's dishonesty regarding a bank loan signed by the parties. The agent was

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70. *Id.* at 15-16, 18 n.3. The reasonable hourly rate was $125 because the expired representation agreement stated that Gross agreed to pay Sun West the lesser of $125 per hour or $1000 if Blatt was not able to negotiate a contract above the minimum salary level.

71. Landrum v. Gross (Sept. 10, 1987) (Culver, Arb.).

72. NFLPA REGULATIONS, *supra* note 3, § 4(A).

73. Landrum v. Gross, at 15-16 (Sept. 10, 1987) (Culver, Arb.).

74. Segers v. Clark (Aug. 29, 1986) (Culver, Arb.).

denied all compensation, including an award based on quantum meruit.[75] In the decision, the arbitrator apparently attempted to transmit a message that a breach of fiduciary duty would not be tolerated because the *NFLPA Regulations* were promulgated to alleviate this problem.

It is difficult for the arbitrator to determine the point at which the agent breaches the fiduciary duty owed to his client. Arbitrators have indicated that a player bears the burden of proving an agent's breach of fiduciary duty. It is not exactly clear what behavior constitutes a breach of fiduciary duty on the part of an agent, but a player must at the very least show that the agent was under a duty to provide financial advice and did so in an unreasonable manner.[76] Many representation agreements do not include the payment of fees for financial advice, but player-agent contracts stating that an agent will provide financial services for a player subject the agent to a duty to provide reasonable financial advice.

The arbitrators have frequently been confronted with cases involving representation agreements containing a blanket fee provision for negotiations and financial services. Two of these cases involved the actions of agent Joe Courrege in his dealings with players James "Tootie" Robbins[77] and Darryal Wilson.[78] The representation agreements each provided for a payment of six percent of the player's salary to be paid to the agent for negotiations and financial services.[79] These players filed grievances at different times seeking a refund of money paid based on the agent's breach of his fiduciary duty. The arbitrators' rulings on these separate cases forced the agents to separate the fees charged for negotiations from the fees charged for financial services. In both cases, the arbitrator ruled that Courrege had breached the fiduciary duty he owed to the players.[80]

In the grievance filed by Robbins, Arbitrator Moffett ruled that Courrege breached his fiduciary responsibilities with respect to the administration and management of Robbins' funds.[81] This conclusion was based on the substantial tax liability Robbins incurred during the years of representation

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75. *Id.* at 16-17.

76. *See* Dickerson v. Rodri, at 15 (Aug. 3, 1989) (Kaplan, Arb.).

77. Robbins v. Courrege (Nov. 18, 1985) (Moffett, Arb.).

78. Wilson v. Courrege (Nov. 12, 1986) (Culver, Arb.).

79. *Id.* at 1; Robbins v. Courrege, at 1 (Nov. 18, 1985) (Moffett, Arb.).

80. Wilson v. Courrege at 18-20, 25 (Nov. 12, 1986) (Culver, Arb.); Robbins v. Courrege, at 1-2 (Nov. 18, 1985) (Moffett, Arb.).

81. Robbins v. Courrege, at 1-2 (Nov. 18, 1985) (Moffett, Arb.).

and the absence of an effective tax plan.[82] The arbitrator was forced to determine the amount of fees charged for financial services in order to refund these payments to the player. Arbitrator Moffett found a fee allocation of two percent for negotiation services and four percent for financial management services to be an equitable division based on the amount of time spent on these services. The arbitrator noted that contract negotiations are essentially a one-time task, while tax planning and financial management are carried on all year and require more time and effort.[83]

Arbitrator Culver followed the reasoning of Arbitrator Moffett concerning the allocation of fees in *Wilson v. Courrege.*[84] Arbitrator Culver used the same fee allocation, but ordered Courrege to refund only the fees paid for tax advice, and not the fees charged for real estate investments. Courrege was ordered to refund fees paid for tax advice because he failed to explain to Wilson the concept of the present value of money when putting together a tax plan.[85] Although Wilson lost a considerable amount of money in a few suspect real estate investments assembled by Courrege, Arbitrator Culver denied a refund saying, "Courrege had done everything a competent financial counselor would have done under the circumstances."[86] This decision illustrates the arbitrator's abhorrence of breaches of fiduciary duty, and the heavy burden placed on players asserting this type of grievance.

D. *Miscellaneous Subjects*

The arbitrators have been confronted with a multitude of other issues. The resolution of many of these seemingly trivial issues has helped to shape the behavior of players and agents in future dealings. The standard representation agreement is only five pages in length, resulting in ambiguous provisions and possible omissions. As a result, arbitrators have been asked to resolve many questions arising from this form contract.

A few agents named in arbitration grievances have sought to hide behind their corporation as a shield from personal liability. This defense was based on the contention that an individual is not a proper party in an arbitration proceeding if the player contracted with the agent's firm, instead of the agent personally. Arbitrators have rejected this argument, citing the *NFLPA*

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82. *Id.*

83. *Id.* at 2.

84. Wilson v. Courrege, at 26-27 (Nov. 12, 1986) (Culver, Arb.).

85. *Id.* at 20, 25.

86. *Id.* at 25.

Regulations, which state that only individuals can serve as contract advisors, not corporations or other entities.[87] Therefore, even if a player signs a representation agreement with a firm, the agent involved in the negotiations will be held personally liable for any improper conduct.

Another important subject covered in the arbitration cases is the timing of fee payments paid by a player to his agent. Under the *NFLPA Regulations*, fees "shall not be due and payable to [the] Contract Advisor unless and until the Player receives the compensation provided for in the player contract(s) negotiated by [the] Contract Advisor."[88] The arbitrator has strictly enforced this provision by ruling that a player is not under an obligation to remunerate his agent until the team has commenced payment of the player's salary or signing bonus.[89] The import of the theory of "percentage of money earned," on which all player contracts are based, is that a player is only required to pay an agent the stated percentage of the money he has actually received. If a player is released or traded before being fully compensated, the agent is only entitled to the contractual percentage of money earned and received by the player. This section of the regulations is based on equitable concerns, so agents cannot manipulate the terms of a contract to force a player to pay a higher amount than the bargain requires. The *NFLPA Regulations* also release a player from contractual liabilities to an agent if the player signs a new player contract in the NFL prior to the termination of the contract in question, a policy which may grant the players an unfair advantage.[90] A literal interpretation of this provision would permit a player to renegotiate his contract to the detriment of his agent by allowing the player to sign a new contract to escape liability arising under the previous contract.

The arbitrators have been successful in retaining jurisdiction over issues that did not initially appear to fall under the *NFLPA Regulations*. This broad interpretation has allowed arbitrators to exert a significant influence over the conduct of both players and agents. This procedure has flourished with continued help from various courts, where judges have refused to intervene by denying requests to avoid arbitration. Both state and federal courts have adhered to the binding effect of the NFLPA's arbitration procedure for players and agents.

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87. Cole v. Lustig, at 10 (July 16, 1987) (Culver, Arb.).

88. NFLPA REGULATIONS, *supra* note 3, Exhibit C, § 2.

89. *See* Singman v. Young, at 15-16 (June 23, 1989) (Culver, Arb.).

90. NFLPA REGULATIONS, *supra* note 3, Exhibit C, § 6.

V. JUDICIAL ADHERENCE TO THE NFLPA ARBITRATION PROCEDURE

State and federal courts have exhibited a reluctance to rule on cases falling under the *NFLPA Regulations*' arbitration provision. For the most part, judges have chosen to avoid judicial interference in labor disputes.[91]

In one state action, a player who was successful in an earlier arbitration proceeding moved to confirm the arbitration award. The agent responded by moving to vacate the award due to insufficient notice.[92] The judge remanded the case, ruling that the arbitrator must determine whether the agent received proper notice of the arbitration proceedings. In the decision, the judge expressed the view that the arbitrator has the power to ultimately determine all issues involved in the proceeding.[93] Another state court upheld the NFLPA arbitration procedure on a number of different grounds.[94] The defendant, an NFL player, opposed arbitration on jurisdictional grounds relating to fraud and illegality, but the judge ruled that an agreement to arbitrate is valid even if the substantive portions of the contract were induced by fraud due to the broad scope of the arbitration clause.[95] The judge also ruled that an athlete who has not played in the NFL before signing a standard representation agreement with an agent is still considered a "player" under the *NFLPA Regulations*, and both parties are subject to its rules. The judge reasoned that once a player-agent agreement is signed, the arbitration provision comes into effect because the obligations of the contract are only triggered if the player signs with an NFL team. Therefore, the *NFLPA Regulations* must apply to these agreements because signing with an NFL team creates automatic affiliation with the NFLPA.[96]

On one rare occasion, a federal district court rendered a final decision in a case involving the *NFLPA Regulations*' arbitration procedure, but only due to unusual circumstances.[97] This highly publicized case, involving the fraudulent activities of agents Norby Walters and Lloyd Bloom, was instituted in a federal district court by the agents who sought to recover monies spent inducing certain players to sign representation agreements with them.

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91. National Football League Players Ass'n v. National Football League, 724 F. Supp. 1027 (D.D.C. 1989).

92. Allen v. McCall, 521 So. 2d 182 (Fla. Dist. Ct. App. 1988).

93. *Id.* at 183.

94. Walters v. Harmon, 135 Misc. 2d 905, 516 N.Y.S.2d 874 (Sup. Ct. 1987).

95. *Id.* at 905-06, 526 N.Y.S.2d 874, 875-76.

96. *Id.* at 906, 526 N.Y.S.2d 874, 876.

97. Walters v. Fullwood, 675 F. Supp. 155 (S.D.N.Y. 1987).

The defendants, current NFL players, moved to stay the proceedings pending arbitration. The judge denied the arbitrator a chance to rule on the dispute by declaring the representation agreements null and void as a violation of public policy.[98] The judge basically made the decision for the arbitrator by declaring, "The principles requiring non-enforcement of contracts on public policy grounds apply equally to arbitration agreements."[99] These agents were later convicted in federal court for committing several crimes based on their fraudulent inducements to college players.[100]

VI. Recent Developments

The NFLPA has renounced its position as the exclusive bargaining representative of the players for the best interests of the players.[101] If the NFLPA were to remain as a union, this would provide antitrust insulation for the owners. The owners would then be permitted to implement unilateral changes of certain subjects contained in the expired collective bargaining agreement contrary to the wishes of the players.[102]

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98. *Id.* at 161.

99. *Id.* at 162.

100. United States v. Walters, 711 F. Supp. 1435 (N.D. Ill. 1989). A federal district court jury convicted Norby Walters and Lloyd Bloom for defrauding two universities by using cash to lure college athletes into signing improper contracts. The jury deliberated forty hours before convicting Walters and Bloom on charges of racketeering and mail fraud. But the fate of these individuals is presently unclear because a court of appeals reversed and remanded the case and presented instructions for a new trial. This reversal was based on the district court's failure to provide proper jury instructions, as well as the court's denial of Bloom's motion for severance. (*See United States v. Walters*, 913 F.2d 388 (7th Cir. 1990).

101. Telephone interview with Tom DePaso, Esq., NFLPA Staff Counsel (Jan. 18, 1990).

102. Powell v. Nat'l Football League, 888 F.2d 559, 573-74 (8th Cir. 1989), (Lay, C.J., dissenting). Chief Judge Lay alluded to this inescapable result in his dissenting opinion denying the NFLPA's attempt to sue the NFL and its teams on antitrust grounds. The NFLPA sought to deny the NFL's imposition of a "First Refusal/Compensation system, [which] provided that a team could retain a veteran free agent by exercising a right of first refusal and by matching a competing club's offer." *Id.* at 561 (Gibson, J.). The NFLPA challenged this system as an unlawful restraint of trade, a direct violation of antitrust law. Chief Judge Lay stated:

> [T]his court's unprecedented decision leads to the ineluctable result of union decertification in order to invoke rights to which the players are clearly entitled under the antitrust laws. The plain and simple truth of the matter is that the union should not be compelled, short of self-destruction, to accept illegal restraints it deems undesirable. Union decertification is hardly a worthy goal to pursue in balancing labor policy with the antitrust laws.

Id. at 573-74 (Lay, C.J., dissenting) (citation omitted).

The NFLPA renounced its representation of NFL players by sending a letter to NFL management which informed team owners that the NFLPA ceased to exist as the exclusive bargaining representative of the players as of the date of the letter.[103] This strategic legal maneuver enables NFL players individually to commence suit against team owners for instituting changes in the expired collective bargaining agreement that violate federal antitrust laws.[104] The NFLPA made this decision because a United States Court of Appeals ruled that the NFLPA could not institute an antitrust suit against team owners over a particular subject of the expired collective bargaining agreement so long as it remained the exclusive bargaining representative of the players.[105]

The NFLPA decided to change its objective and direction, transforming itself from a labor union to an association specializing in public relations, marketing, and group licensing. It will continue to offer legal advice to players choosing to become members as well as providing salary information to registered agents. The NFLPA actually existed as a voluntary nonprofit association from 1956 to 1971 before becoming the exclusive bargaining representative of the NFL players. The association was originally organized by players on the Green Bay Packers in an effort to have clean clothing for practices. At that time, players did not enjoy the luxury of being provided with clean "socks and jocks" for the three practices that took place each day in the preseason, so they formed an association to take care of this task and to deal with other problems with team management.[106]

The NFLPA has retained its name, becoming a voluntary association for players, much like the American Bar Association exists for attorneys and the American Medical Association exists for physicians. Agents will not be forced to become certified by the NFLPA to represent NFL players, but can decide individually whether to become registered. The agents will be encouraged to register because the NFLPA will provide its registered agents with useful salary information concerning the values attributed to each position on the playing field, which will help these agents in their negotiation of player contracts.[107] The association will also continue to provide an abundance of services and benefits to help the players. The NFLPA will

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103. *Supra*, note 101.

104. USA Today, Dec. 5, 1989, § C (Sports), at 1.

105. *See* Powell v. Nat'l Football League, 888 F.2d 559 (8th Cir. 1989).

106. Interview with John Macik, NFLPA Staff Representative, at NFLPA Contract Advisors Seminar, Washington Hilton Hotel, Washington, D.C. (Jan. 16, 1990).

107. Telephone interview with Mark Levin, NFLPA Agent System Coordinator (Jan. 11, 1990).

benefit the players by coordinating and funding lawsuits necessary to protect individual negotiations and to secure the free market, approving agents, conducting financial planning seminars, and providing other legal and medical assistance.[108] As a result of this transformation, some provisions of the *NFLPA Regulations* have been amended, with the new version being titled the *Code of Conduct for NFLPA Member Contract Advisors* ("*Code of Conduct*").[109] Although changes have occurred within the NFLPA, the *Code of Conduct* arbitration procedure is almost identical to the one outlined in the *NFLPA Regulations*. The sole change is the deletion of the mediation aspect. The parties are no longer required to attempt to mediate their disputes before arbitration. Now the parties can proceed more quickly through the system because the arbitrator is provided with copies of the grievance within thirty days of the date the NFLPA receives the grievance.[110] The deletion of the mediation step does not impair the parties' ability to mediate their dispute because all time periods in the arbitration process can be extended by mutual consent. Furthermore, the parties always retain the option of settlement.[111]

Disputes will inevitably arise between players and agents, so this procedure will continue to be used to resolve many grievances. Decertification means that agents may represent players without becoming registered by the NFLPA, but agents taking this route will not be able to enjoy the multitude of benefits bestowed on them as registered agents of the NFLPA. Agents deciding to become registered contract advisors of the NFLPA must

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108. PLAYBOOK, Vol. 1, No. 2 at 3 (Dec. 14, 1989) (*Playbook* is an NFLPA publication for players and agents).

109. CODE OF CONDUCT FOR NFLPA CONTRACT ADVISORS (Nat'l Football League Players Ass'n. 1990) (effective April 1, 1990) [hereinafter CODE OF CONDUCT]. The introduction states:

> On November 6, 1989, the NFLPA renounced its right to act as the exclusive collective bargaining agent for NFL players and also ceased to function as a labor organization. The NFLPA reconstituted itself as a professional association dedicated in part to protecting the individual contracting rights of professional football players. As a result of this action, the competence with which an agent performs his or her job in representing an NFL player has gained increased importance . . . .
>
> If an agent elects to become an NFLPA Member Contract Advisor, he must follow the CODE OF CONDUCT established herein. Membership as a Contract Advisor is totally voluntary, but once an agent joins he can be expelled for a failure to adhere to the Code.
>
> Our Association is dedicated to assisting NFL players in acquiring the best possible individual representation. We are of the opinion that agents who decide to become Member Contract Advisors and adhere to this CODE OF CONDUCT will help improve the quality of the services that they provide their players/clients.

110. *Id.* § 5(E).

111. Telephone interview with Tom DePaso, Esq., NFLPA Staff Counsel, (August 28, 1990).

adhere to the *Code of Conduct* or be subject to certain sanctions, including possible termination.[112] One of the requirements for an agent to maintain membership in good standing will be to use the mandatory representation agreement contained in the *Code of Conduct*, which includes the arbitration provision.[113]

The representation agreement contained in the *Code of Conduct* is almost identical to the standard representation agreement contained in the *NFLPA Regulations*. The only major change is the deletion of a set maximum fee that agents can charge the players for services rendered. The other modifications are primarily alterations in word structure in order to clarify the fact that the NFLPA is no longer the exclusive bargaining representative of the players. Although the NFLPA no longer regulates the compensation received by agents, the association will publish industry averages in its periodic newsletter to members, which should maintain a similar payment scale in the representation agreements.[114] These industry averages will reflect the average percentage of a player's salary charged by an agent who is a member of the NFLPA. Presently, agents charge the players anywhere from three to five percent of the player's salary for compensation for negotiations with team management.[115] This publication will serve to alert players seeking representation of the average fees charged by agents, and will inform agents of the competitive pricing of their counterparts.[116]

VII. Conclusion

Arbitration has recently become the preferred forum for settling disputes in professional sports. This procedure offers a viable alternative to parties wishing to avoid the normal time delay of the judicial process. The NFLPA's unique arbitration system was instituted to specifically cover disputes arising between players and their agents. This fast, efficient system has handled over sixty cases, with others presently pending, and has been

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112. Code of Conduct, *supra* note 109, Introduction.

113. *Id.* § 3(A)(1). A copy of the Representation Agreement must be mailed to the NFLPA within 30 days of execution. If a copy of the Representation Agreement is not mailed to the NFLPA within 30 days, the agreement becomes unenforceable by the agent, but continues to be enforceable by the player, at his option.

114. Telephone interview with Mark Levin, NFLPA Agent System Coordinator (Jan. 11, 1990).

115. *Id.*

116. *Id.*

instrumental in shaping proper standards of conduct in the player-agent relationship.

The NFLPA's arbitration procedure articulates time guidelines to ensure rapid dispute resolution.[117] A player or agent may initiate the procedure by filing a written grievance setting forth the facts and circumstances giving rise to the grievance and the relief sought. The opposing party must then file an answer within ten days of receipt of the grievance. The arbitrator, who is provided with copies of all relevant documents from the NFLPA, then selects a time and place for the hearing, which usually occurs within a year from the initial grievance.[118] This quick method of relief has enabled both players and agents to recover money owed to them.

The arbitrators have ruled very equitably, even circumventing contractual clauses to allow an agent to collect payment for services performed. Awards based on quantum meruit are a familiar result in the cases, unless the agent has breached the fiduciary duty owed to the player, in which case the agent is denied any compensation. A close analysis of these cases is important in order to predict future rulings and prescribe the proper conduct to be displayed by professional football players and their agents.

The NFLPA's decision to decertify as the exclusive bargaining representative of the players has not altered the arbitration procedure. The *NFLPA Regulations* have been amended and renamed the *Code of Conduct*, which contains an almost identical arbitration procedure. The sole change is the deletion of the mediation mechanism. In fact, this deletion has expedited the arbitration process because the parties are no longer required to attempt to mediate their dispute, but can proceed directly to a formal arbitration hearing. Although minor changes will also appear in the representation agreement, the arbitration provision remains because of its past success. This detailed arbitration procedure may be amended from time to time, but disputes will continually be subject to arbitration due to its inclusion in the representation agreement signed by players and their agents. Therefore, players and agents should shape their behavior according to prior arbitration decisions, because future arbitrators will likely view these cases as precedent in developing a proper "code of conduct" for NFL players and their agents.

Jeffrey D. Meyer

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117. CODE OF CONDUCT, *supra* note 109, § 5.

118. *Id.*

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